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IN THE

Supreme Court of the United States

No. 75-283

FREDERICK BITZER, et al.,

Petitioners,

vs.

DONALD MATTHEWS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Statement of Interest of *Amicus* State of New York

The petitioners are asking this Court to determine whether the Eleventh Amendment bars an award of attorneys' fees against defendant State officials because such fees are to be paid out of the State's treasury. This question is of direct and substantial interest to the Attorney General of the State of New York. As the State's chief legal officer (N.Y. Executive Law § 63), the Attorney General is charged, *inter alia,* with the defense

of "all actions in which the state is interested". He is therefore charged with defending State officials who are sued in federal courts and with protecting all aspects of the State's sovereignty in those suits.

It is a well known fact that, in recent years, the number of actions filed in federal courts against State officials has burgeoned. A rule permitting an award of attorneys' fees in such cases would, therefore, result in a substantial invasion of the State's treasury which is unnecessary to the vindication of federal rights. Accordingly, we join the State of Connecticut in urging this Court to reverse the decision below insofar as it awards attorneys' fees payable with State funds.

POINT I

The decision below, awarding attorneys' fees to the plaintiffs which must be paid with State funds, is contrary to the language and the spirit of this Court's decision in *Edelman* v. *Jordan*.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court held that, absent consent by the State, the Eleventh Amendment bars an award to private parties of retroactive welfare benefits payable out of State funds. This type of payment, however, was distinguished from the expenditure of State funds as a "*necessary* result of compliance with decrees which by their terms [are] prospective in nature." 415 U.S. at 668 (emphasis supplied). Such "necessary" and "often . . . inevitable" expenditures by State officials in giving effect to the mandate of a federal court have "an ancilliary" effect on the State treasury which the Eleventh Amendment does not bar.

The effect of the retroactive-prospective distinction—although not expressed in the Court's opinion—is to serve the interests of federalism. It assures, on the one hand, that the states will comply in the future with federal law

and, on the other, that there will be the least possible interference with proper State functions.

An award of attorneys' fees against the State does nothing to preserve the interests of federalism. On the contrary, it directly impinges upon the State's fiscal independence and, to the extent that it carries a threat for the future, acts as a restraint on State officials, not only in the performance of their duties, but in their conduct of the litigation against them as well.* Compare *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974).

The court below, in holding that the plaintiffs were not entitled to payment of retroactive retirement benefits, stressed its concern with maintaining the "balance between enforcement of individual constitutional rights and protection of the State's fiscal administration under the Eleventh." Paradoxically, however, although the Court's reasoning applies equally to an award of attorneys' fees, the opinion makes no reference to the Court's earlier concern with the tension between the Eleventh and Fourteenth Amendments. Instead, the Court summarily awarded fees on the ground that they were ancillary to the prospective injunctive relief, i.e. "[i]n order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees."

The Court's reasoning is defective in several respects. First, it goes well beyond the plain meaning of this Court's language in *Edelman.* Just as the expenditure by the State of State funds in payment of attorneys' fees is not a "necessary" or "inevitable" consequence of injunctive relief, an

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* Just as the prospect of attorneys' fees may act as an incentive to sue, from the defendant's standpoint, they may act as an incentive to settle. Where the defendant is a State official carrying out, in good faith, a public policy adopted by the State, he should be free to defend that policy without having to fear that his decision to do so may have an additional and often significant effect on the State's treasury.

award of fees is not a "necessary" device to obtain relief against the State. For example, the plaintiff may be financially able to pay his attorney or the attorney may be institutionally funded. Moreover, although attorneys' fees must be incurred in the course of obtaining future relief, this expenditure would not have been required in the first place had there been no "*past* breach of a legal duty on the part of the defendant State officials". *Edelman* v. *Jordan*, 415 U.S. at 668 (emphasis supplied). In this sense, they more closely resemble "a form of compensation" and run afoul of *Edelman*. *Ibid.*

Certainly, the cases relied upon by the Circuit Court are no authority for its interpretation of *Edelman*. *Class* v. *Norton*, 505 F. 2d 123 (2d Cir. 1974) is easily distinguishable since the fees there were not awarded as a consequence of bringing the original action, but as a "necessary result of attempts to gain compliance with a [prospective] decree" which had already been obtained by the plaintiffs. 505 F. 2d at 127. The viability of the other two cases relied upon by the Court was undermined three weeks after the decision below by this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd.* 409 U.S. 942 (1972), in which an award of fees was summarily affirmed before *Edelman* and which, because it was not expressly disavowed in *Edelman* has been relied upon to justify fee awards, was distinguished on the ground that the "District Court [there] indicated that there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees." 421 U.S. at 270, n. 46. In the instant case, there is no suggestion of bad faith. The other case, *Souza* v. *Travisono*, 512 F. 2d 1137 (1st Cir. 1975) was one of several decisions criticized by this Court because of the reasoning used to support an award of fees. *Ibid.*

In *Souza*, the First Circuit held that an award of costs was appropriate under the private attorney general

theory. The Court concluded that such an award was not barred by the Eleventh Amendment on the ground that fees are "generically" the same as costs and costs against the State were approved by this Court in *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70 (1928). 512 F. 2d at 1140. However, *Fairmont Creamery* is dubious precedent in cases like *Souza* and the instant case since it originated as a criminal prosecution by the State and, therefore, technically was not "commenced or prosecuted against" the State as contemplated by the Eleventh Amendment. Moreover, to the extent that fees are awarded as an incentive to sue, as in *Souza,* attorneys' fees may not be equated with ordinary costs of litigation such as the expense of printing the record.

A second defect in the reasoning of the Court below is that, logically, the successful plaintiff would always be entitled to fees because litigation always involves costs and attorneys' fees as an incident to obtaining relief. Such a rule may only be characterized as a "drastic" departure from the traditional American view that attorneys' fees are not ordinarily recoverable. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 269 (1975).

Finally, the decision below fails to examine the nature of an award of attorneys' fees, an omission which is particularly unreasonable given the fact that the State's interests under the Eleventh Amendment are at stake. Although they may not be expressed, there are many facets to an award of fees. For example, in addition to the element of compensation, referred to *supra,* there is always a punitive element inherent in an award of fees. As a consequence, whenever an award is made against a State official and, as in the instant case, there is no suggestion of bad faith, the State is, in essence, being punished simply because it has defended its statute or action or policy and has lost. This result hardly squares with the strict interpretation given the "American rule" regarding fee

awards. See *Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (the unsuccessful party must have acted "'in bad faith, vexatiously, wantonly, and for oppressive reasons'").

The most important element of a fee award in a case like the instant one, however, is to encourage litigants to bring suits to vindicate a public interest. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). This basis for awarding fees, which has come to be called the private attorney general theory, was rejected by this Court where a private party is liable for the fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). There is even less justification for relying on this theory in a case involving the State.

At a time when the number of lawsuits attacking State activities continues to increase and determinations by federal courts are affecting virtually all areas of State interest (See *Monroe* v. *Pape*, 365 U.S. 167 [1961] [police procedures for search, arrest and detention]; *McNeese* v. *Board of Education*, 373 U.S. 668 [1961] [education]; *Goldberg* v. *Kelly*, 397 U.S. 254 [1970] [welfare]; *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 [2d Cir. 1968] [public housing]; *Sostre* v. *McGinnis*, 442 F. 2d 178 [2d Cir. 1971] [*in banc*], *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 [1972] [prisoners' rights]), we believe that awards of fees would aggravate already existing friction. This Court should not lose sight of the fact that State officials are particularly vulnerable defendants who are frequently the objects of insubstantial lawsuits. The potential availability of fee awards could not help but encourage an increase in this type of litigation. Moreover, as a practical matter, there is no countervailing deterrence to such litigation because so many suits are brought by indigent plaintiffs as against whom costs and fees are uncollectable.

In *Edelman* v. *Jordan* this Court concluded that effectuation of federal law did not require an award of retro-

active benefits payable out of the State's treasury. *A fortiori,* it does not require that attorneys' fees, payable from the same source, be awarded to plaintiffs as a reward for initiating the litigation. As the late Mr. Justice Black aptly observed in discussing the concept of federalism:

> "The concept [of federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Younger v. *Harris,* 401 U.S. 37, 44 (1971). See also *Rothstein* v. *Wyman,* 407 F. 2d 226, 236 (2d Cir. 1972), *cert. denied* 411 U.S. 921 (1973).

POINT II

The provision for attorneys' fees contained in Title VII of the Civil Rights Act of 1964 is not a basis for an award of fees payable out of State funds.

Although the District Court granted injunctive relief based upon a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.,* as amended, an award of attorneys' fees payable out of the State's treasury may not be made under the attorneys' fees provision of that statute. There are two barriers to such an award. The first is that Congress, in amending Title VII in 1972, did not evidence an intent that fees be awarded as against State defendants. The second is that Congress did not abrogate the States' immunity under the Eleventh Amendment.

In 1972 Congress amended Section 701 of the Civil Rights Act of 1964 to include State and local governments, governmental agencies and political subdivisions as "employers" under Title VII. The plaintiffs have urged that this expansion of Title VII's coverage entitles them to avail themselves of all remedies afforded by the Act, which would include § 2000e-5(k), the provision authorizing attorneys' fees. The relevant legislative history fails to support this view.

After citing statistics with regard to discrimination in government employment, the House Report states:

> "While an individual has a right of action in the appropriate court if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of Congress to provide Federal *administrative machinery* to assist the aggrieved employee.
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> • • •
>
> The committee feels that it is an injustice to provide employees in the private sector with an *administrative forum* in which to redress their grievances while at the same time, denying a similar protection to the increasing number of state and local employees. Accordingly, H.R. 1746 provides the *administrative remedies* available to employees in the private sector should be extended to state and local employees.
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> • • •
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> Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate *administrative remedy* to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983. In extending Title VII coverage, the Committee recognizes that States frequently can best deal with violations which occur within their boundaries

> and has, accordingly, retained the provisions of Section 706(b) of the present Act (706(c) under the bill) whereby the Commission will defer to appropriate State agencies cases where the State or local agency can grant the complainant relief similar to that which he can obtain with the Commission under the provisions of this bill." House Rep. No. 92-238 (92nd Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News at 2153-2154. (emphasis supplied).

Significantly, although there are references to the individual's rights to sue under §§ 1981 and 1983 of the Civil Rights Act, indicating that Congress considered the nature of existing judicial relief available to employees suing the State, the Report confines itself to expressing the Committee's intention that the 1972 amendments would not "preempt" those remedies. 1972 U.S. Code Cong. & Admin. News at 2154. Surely if Congress had any intention of expanding those judicial remedies, this would have been the place to say so. Yet the Report indicates no such intention, let alone does it make any reference to the difficulties which might arise because of the Eleventh Amendment.

The Senate Committee Report similarly states the Committee's belief

> "that it is an injustice to provide employees in the private sector with the assistance of an agency of the Federal Government in redressing their grievances while at the same time denying assistance similar to State and local government employees."

Senate Report No. 92-415 (92d Cir. 1st Sess. 1971) in *Legislative History of the Equal Employment Opportunity Act of 1972* at 419-420.

Although the Report raises the question of the states' sovereignty, it does so simply in the context of the power of Congress to include state and local employees in the

Act at all. Thus, it is clear from the language which the Committee quoted from this Court's opinion in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), that the Committee's concern was with whether the State " 'may be forced to conform its activities to Federal Regulation.' " (at 420).

As in the case of the House Report, there is no indication that the Committee addressed itself to the problems of sovereignty which would be occasioned by authorizing money awards such as attorneys' fees. Nor is there any reference to an intention to expand the judicial relief available before the amendments except for a discussion of the new powers of the Attorney General to bring civil action against State and local agencies engaged in unlawful employment practices.*

In light of this legislative silence, this Court should reject any argument that Title VII authorizes an award of fees against a State defendant, particularly since Congress did not alter the provisions of § 2000e-5(k) when it

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* That the Committee was concerned with minimizing the impact of the amendments on the federal system is evident at page 434 of the *Legislative History* where the Report states that, in the Committee's view, enforcement by the Attorney General:

> "provides the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign states and their localities. In short, the committee believes that the objective of equal employment opportunity can best be achieved by providing this particular means of enforcement where State or local government units fail to comply with the law."

Earlier in its Report, in discussing private civil actions, the Committee stated its expectation that "recourse to this remedy will be the exception and not the rule, particularly once the Commission's enforcement procedures are fully operational" (at 432). Read together with the above statements as to the Attorney General's role, it is apparent that the Committee did not concern itself with the Eleventh Amendment because it expected that judicial enforcement would largely be undertaken by the Attorney General as against whom the Eleventh Amendment is inapplicable. *United States* v. *Mississippi*, 380 U. S. 128, 140-141 (1965).

acted in 1972. See *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973) in which this Court held that Congress, in amending the Fair Labor Standards Act to include state-operated hospitals and their employees, had not sufficiently expressed its intention to abrogate the State of Missouri's immunity. The Court there relied, *inter alia,* on the failure to change the remedial provisions of § 16(b) in amending the Act.

Assuming *arguendo,* however, that Congress intended that fee awards be made against the State such relief is barred by the Eleventh Amendment. Plaintiffs have argued that Congress, acting under Section 5 of the Fourteenth Amendment, has the power to abrogate the State's Eleventh Amendment immunity. However, that question has yet to be decided by this Court. Moreover, even if Congress has such power in particular circumstances, we believe that a statute authorizing the award of attorneys' fees would not be "appropriate legislation" under Section 5. See *Rothstein* v. *Wyman,* 467 F. 2d 226, 237 (2d Cir. 1972), *cert. denied* 411 U.S. 921 (1973); *Anderson* v. *Tennessee Office of Economic Opportunity,* 384 F. Supp. 788 (D.C. Tenn. 1974).

Section 5 provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In *Morgan* v. *Katzenbach,* 384 U.S. 641 (1966), this Court set forth three criteria for determining what is "appropriate legislation" under Section 5: (1) whether the statute is a measure enacted "to enforce the guarantees of the amendment"; (2) "whether it is 'plainly adapted to that end'" and (3) "whether it is not prohibited by but is consistent with the letter and spirit of the Constitution". 384 U.S. at 641. An award of attorneys' fees under Title VII payable out of state funds cannot be sustained under these criteria.

Granting that Title VII and its amendments were enacted to enforce rights secured by the Fourteenth

Amendment, a discretionary award of fees simply as an encouragement to other litigants is, at best, an incidental device for attaining that end and hardly a sufficient basis for sacrificing the State's constitutional grant of immunity. Nor, in any real sense, is such an award consistent with the letter or spirit of the Constitution as interpreted by this Court in *Ex parte Young*, 209 U.S. 123 (1908) and *Edelman* v. *Jordan*, 415 U.S. 651 (1974). See Point I, *supra*. Indeed, it is incongruous to use State funds to pay attorneys as an inducement to them and others to bring suits against the State.

This view of attorneys' fees as a mere incident to the enforcement of rights under Title VII is consistent with the overriding purpose of enacting the 1972 Amendments, i.e., to provide the Equal Employment Opportunity Commission with enforcement powers which it previously did not have. Rather than seeking to encourage litigation against employers, it is evident that Congress was anxious to avoid it. Both the House and Senate Reports stated a preference for administrative review of claims, emphasizing agency expertise and flexibility. Moreover, both Reports express concern that existing calendar congestion in the federal courts would delay resolution of claims if the judicial system were the primary enforcement mechanism. 1972 U.S. Code Cong. & Admin. News at 2146; *Legislative History of the Equal Employment Opportunities Act of 1972* at 427.

Accordingly, we believe that an award of fees under Title VII cannot be sustained, and that the decision below, approving an award of attorneys' fees, should be reversed.

CONCLUSION

The decision below should be reversed insofar as it approves an award of attorneys' fees to plaintiffs' counsel.

Dated: New York, New York, February 13, 1976.

Respectfully submitted,

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